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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,
Petitioner,

—v.—

CATHOLIC SOCIAL SERVICES, INC., *et al.*,
Respondents.

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

—v.—

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND AMERICAN IMMIGRATION LAW FOUNDATION LEGAL ACTION CENTER, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union ("ACLU") is a nationwide nonpartisan organization of almost 300,000 members dedicated to protecting civil rights and civil liberties. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and laws apply equally to all persons, including those who are not citizens of the United States. In particular, the ACLU, through its Immigrants' Rights Project, has advocated for a fair and comprehensive legalization program under the Immigration Reform and Control Act of 1986 ("IRCA") to fully implement the intent of Congress and the requirements of the law.

The American Immigration Lawyers Association ("AILA") is a national bar association of lawyers and law school professors who specialize in immigration and nationality law, and the associated American Immigration Law Foundation ("AILF") is an immigration bar foundation whose Legal Action Center engages in nonprofit litigation and advocacy. AILA and AILF Legal Action Center seek to foster the just administration of immigration law, to advance the quality of practice in the field, and to secure the fair interpretation of immigration legislation.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

INTRODUCTION

This case concerns the power of the district courts to address and to remedy the Immigration and Naturalization Service's ("INS") unlawful implementation of the 1986 "amnesty" program created by IRCA to provide undocumented aliens with legalized status. The instant brief addresses the question of whether IRCA deprived the federal courts of their traditional equitable power to toll the Act's 12-month filing period in order to remedy unlawful INS actions that prevented thousands of eligible applicants from applying for legalization. As shown below, the district courts' remedial orders are consistent with the decisions of this Court as well as with the time-honored principles of equity jurisprudence in Anglo-American Law.[2]

STATEMENT OF THE CASE

In 1986 Congress enacted the Immigration Reform and Control Act. Among other things, IRCA created an "amnesty" program that allowed certain undocumented aliens to apply first for lawful temporary residence and then for permanent residence status. *See generally* 8 U.S.C. §1255a. The Act required that the Attorney General designate a 12-month application period and that aliens apply during that period. 8 U.S.C. §1255a(a)(1)(A). Reflecting Congress' intent to confer legal status on all eligible applicants, IRCA further directed that the Attorney General "shall" legalize all aliens who meet the eligibility standards. 8 U.S.C. §1255a(a).

These two consolidated cases involve class action challenges to two INS provisions implementing the eligibility requirements of IRCA's amnesty program.[3] In both cases the district courts found that the INS policies were inconsistent with the statute and caused eligible aliens to be deprived of the opportunity to obtain legalization. On appeal, the INS did not challenge the district courts' determinations that the policies were unlawful. *See Catholic Social Services, Inc. v. Thornburgh*, 956 F.2d 914, 916 (9th Cir. 1992)(consolidating both cases).

In the first case, *CSS v. Barr*, Catholic Social Services ("CSS") and a class of aliens filed suit immediately after IRCA was enacted challenging INS' restrictive interpretation of the "brief, casual and innocent" provision as set forth first, in a 1986 INS telex and, later, in a May 1, 1987 final regulation. *See* 8 C.F.R. §245a.1(g). After rebuffing defendants' motions and obtaining discovery, plaintiffs filed for summary judgment in November 1987. On April 22, 1988 -- almost twelve months after the May 1, 1987 regulation went into effect, but only twelve *days* before the end of the application period -- the district court ruled that the INS regulation was illegal. In order to provide meaningful relief, the court extended the application period for class members for approximately six

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[2] *Amici* address only the remedial issue because the jurisdictional issue is treated extensively by the parties and *amicus curiae* American Bar Association.

[3] The statutory requirements for eligibility include that the alien have "resided continuously . . . in an unlawful status" in the United States since January 1, 1982, 8 U.S.C. §1255a(a)(2)(A), and have maintained "continuous physical presence" in this country since November 6, 1986. 8 U.S.C. §1255a(a)(3)(A). The "physical presence" requirement was modified by the statutory provision that "brief, casual, and innocent absences" did not constitute an interruption of physical presence. 8 U.S.C. §1255a(a)(3)(B).

On May 1, 1987, the Attorney General promulgated regulations designating May 5, 1987 to May 4, 1988 as the application period. INS also adopted a regulation severely restricting the "brief, casual and innocent" exception to the physical presence requirement, *see* 8 C.F.R. §§245a.2(a); 245a.1(g), as well as one providing that an alien would be deemed not to have maintained continuous "unlawful residence" if he or she entered the United States during the relevant period using a fraudulent visa or fraudulent INS document. 8 C.F.R. §245a.2(b)(8).

months until November 30, 1988.[4] Although the unlawful regulation was in effect for almost the entire 12-month application period, the extension ordered by the district court was for only half of that time.

In the second case, *LULAC v. INS*, the League of United Latin American Citizens ("LULAC") and a class of aliens filed suit in July 1987, two months after the application period began, challenging the regulation denying eligibility to "fraudulent re-entry" applicants. INS withdrew the challenged regulation in October 1987, and the district court subsequently declared it unlawful in July 1988. In August 1988, the *LULAC* court ordered the application period extended for approximately three months until November 30, 1988 for eligible class members -- again a period shorter than the time that the unlawful regulation was in effect. 956 F.2d at 918-19.

In both cases, as a result of the illegal regulations and INS' administration of those regulations, eligible applicants were prohibited or deterred from submitting applications. Specifically, thousands of applicants attempted to apply but were told by the INS not to submit applications. Other applicants, aware they were ineligible under INS' restrictive policies, were deterred from pursuing legalization.[5] Based on these findings, the *CSS* and *LULAC* courts tolled the 12-month application period for six and three months respectively to afford a meaningful application period to class members who would have applied but for the offending regulations. These limited extensions carefully reflected the number of months that the illegal regulations were in effect.

[4] The November 30, 1988 date is significant because it was the deadline for applications for the separate "SAW" amnesty program created by IRCA to provide legalized status for "special agricultural workers." *See* 8 U.S.C. §1160(a)(1)(A); 8 C.F.R. §210.2(c). Thus, even without the district court's order, INS had to maintain a legalization application process until the end of November 1988.

[5] The INS was under an affirmative duty to publicize the requirements for legalization. 8 U.S.C. §1255a(i). In carrying out that mandate, the agency publicized the restrictive eligibility requirements that the district courts subsequently declared invalid.

SUMMARY OF ARGUMENT

The federal courts possess the power to order equitable relief in order to effectuate the intent of Congress. In *Irwin v. Veterans Administration*, __ U.S. __, 111 S.Ct. 453 (1991), this Court recognized that the equitable tolling of statutory time limits is presumptively consistent with congressional intent. That is particularly true here. Congress intended eligible undocumented aliens to have a full 12-month period to apply for legalized status. As a result of the INS' unlawful implementation of the program, the application period was severely restricted if not effectively eliminated for thousands of eligible applicants. In response, the district courts properly ordered the application period tolled for a limited duration to provide applicants with the full application period that Congress intended.

The history of the judiciary's equitable authority further confirms that the relief ordered in this case is consistent with the courts' power to fashion a meaningful remedy. Equity has always been premised on the recognition that the legislature can neither anticipate every violation of law, nor specify every type of relief. Historically, therefore, it has been necessary for the courts to impose case-specific relief to ensure that legislative will is not frustrated by unanticipated or unauthorized events. This historical practice began under Greek and Roman law, was later refined by the English Chancery, and is now firmly embedded in our system of jurisprudence.

ARGUMENT

I. TOLLING IRCA'S 12-MONTH FILING PERIOD IS CONSISTENT WITH THE DECISIONS OF THIS COURT

The First Judiciary Act vested the federal courts with a body of equitable remedies, procedures and practices developed in the English Court of Chancery. *See* L. Friedman, A HISTORY OF AMERICAN LAW 21, 130 (1973). Since that time the federal courts have consistently utilized their broad authority to fashion equitable relief to effectuate congressional intent. *See Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970); *Mitchell v. Robert De Mario Jewelry*, 361 U.S. 288 (1960); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939). Indeed, the power "to mould each decree to the necessities of the particular case," *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 (1971)(citations omitted), is an indispensable complement to legislative enactment, which cannot provide for every contingency.

In fashioning equitable remedies, federal courts may of course not "disregard statutory and constitutional requirements." *INS v. Pangilinan*, 486 U.S. 875, 883 (1988). Rather, their task is to determine what relief is necessary to insure that such requirements are satisfied. At times strict adherence to the literal import of a provision may be the proper means of doing so. *See, e.g., Pangilinan*. In other cases, such unbending literalism in the face of events, unanticipated and unauthorized by Congress, will undermine legislative intent. Ultimately, then, "the proper test is . . . whether [equitable relief] in a given context is consonant with the legislative scheme." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 557-58 (1974). *See Bowen v. City of New York*, 476 U.S. 467, 480 (1986)(test is "whether equitable tolling is consistent with Congress' intent").

The tolling of statutory time limits is one of the

equitable remedies traditionally employed by federal courts to effectuate congressional intent. Two terms ago this Court resolved all doubt regarding its earlier cases and held that, despite the sovereign immunity concerns raised by suits against the government, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Veterans Administration*, 111 S.Ct. at 457. "Such a principle," the Court stated, "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation. Congress, of course, may provide otherwise if it wishes to do so." *Id.* Thus, after *Irwin*, where the government argues against the tolling of a statutory time period, it bears the burden of showing that Congress, contrary to its normal practice, intended to strip the federal courts of their equitable authority.

Here, as in *Irwin*, the provision at issue is a timeliness requirement. *See* 8 U.S.C. §1255a(a)(1)("applicants must apply for . . . adjustment during the 12-month period"). Consequently, it is presumptively subject to equitable tolling since that "is likely to be a realistic assessment of legislative intent . . . ." *Id.* To prevail in this case, therefore, petitioners bear the burden of affirmatively demonstrating that Congress intended IRCA's filing period not be subject to equitable modification. Petitioners have not and cannot meet this test. To the contrary, an examination of the objectives underlying IRCA reveal that equitable tolling is entirely consistent with, and indeed indispensable to, achieving those objectives.

IRCA's amnesty program had two related objectives, both of which were undermined by INS' unlawful actions. First, "in recognition that a large segment of the shadow population played a useful and constructive role in the American economy, but continued to reside in perpetual fear, the Reform Act [IRCA] established two broad amnesty programs to allow existing undocumented

aliens to emerge from the shadows" and obtain legalized status. *McNary v. Haitian Refugee Center*, ___ U.S. ___, 111 S.Ct. 888, 890 (1991). Second, Congress believed that by legalizing those undocumented aliens already within the country, INS would be free to concentrate its limited enforcement resources on controlling the border. *Id.* at 890 & n.4 (discussing H.R. Rep. No. 99-682, pt. 1, p.49 (1986)). By preventing thousands of potentially eligible applicants from applying for legalized status, petitioners frustrated both of these objectives.

Concededly, Congress did not want the legalization program to last indefinitely. But, Congress also did not anticipate that unlawful INS action would prevent thousands of potentially eligible applicants from applying during the prescribed 12-month filing period, and it never suggested that the application deadline should insulate patently unlawful INS action. Indeed, when confronted with this issue during a debate over a post-IRCA enactment, Senator Grassley stated:

> [T]he proponents [of an across-the-board extension] argue that certain court decisions recently handed down make some 75,000 persons eligible for the legalization program. *There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well-equipped to evaluate [such] equitable considerations.* The Senate need not enact a broad extension to accommodate certain litigants.

Remarks of Senator Grassley, Cong. Rec. S5401 (Apr. 28, 1988)(emphasis added).

Moreover, petitioners do not simply suggest that Congress intended the filing period to preclude meaningful relief under the circumstances of these cases. Instead, petitioners adopt the position that *under no circumstances* is IRCA's filing period subject to tolling.

Under this view, the district courts would have had no authority to enjoin INS action and extend the deadline even if INS had refused to open their offices for a single day during the entire 12-month period.

Petitioners nevertheless contend that tolling was improper because IRCA provides that the filing period shall last no longer than twelve months. That IRCA's timeliness requirement was expressed in unambiguous terms cannot, however, be the end of the inquiry. Statutory time periods are invariably expressed in mandatory and inflexible terms. Yet *Irwin* created a strong presumption in favor of tolling that operates in *all* cases, irrespective of how "stringent" the time period may be. 111 S.Ct. at 457. Indeed, *Irwin* noted that even language as stringent as that found in *Soriano v. United States*, 352 U.S. 270 (1957)("every claim . . . shall be barred unless the petition . . . is filed . . . within six years . . . "), should presumptively be subject to tolling. The Court acknowledged that this "language is more stringent than the . . . [language of other provisions]," but concluded nevertheless that "the difference . . . is [not] enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Irwin*, 111 S.Ct. at 457.

Apparently recognizing that the presumption in favor of tolling applies even to the most stringent and explicit time provisions, *id.*, petitioners attempt to distinguish *Irwin* on other grounds. Specifically, petitioners argue that *Irwin* applies only to a "statute of limitations." Pet.Br. at 32. Although they concede that IRCA's 12-month filing period is a "timeliness requirement," *id.*, petitioners nevertheless contend that it does not fall within *Irwin*'s presumption because it is "one of the four substantive requirements for relief." *Id.* This distinction, on which petitioners' entire argument hinges, is of no consequence and is not supported by this Court's decisions.

Irwin did not limit its analysis solely to "statutes of limitation;" it referred more generally to "time limits."

See id. at 456-58. Nor are other equitable tolling decisions of this Court, of which *Irwin* was only the culmination, limited to what might be termed pure "statutes of limitation." *See, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)(timeliness provision is "a requirement that, *like a statute of limitations*, is subject to . . . equitable tolling")(emphasis added). Indeed, the Court's decisions make clear that whether or not a "time limit" is deemed "substantive" or "procedural" is irrelevant for purposes of tolling. *See American Pipe and Construction*, 414 U.S. at 557-58 ("the proper test is not whether a time limitation is 'substantive' or 'procedural' but whether tolling is consonant with the legislative scheme"). *See also Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-27 (1963)("classification . . . as 'substantive' rather than 'procedural' does not determine whether the . . . period may be extended"); *Glus v. Brooklyn East. Dist. Term.*, 359 U.S. 231, 234-35 (1959).[6]

[6] The government relies on a pre-*Irwin* decision, *Schweiker v. Hansen*, 450 U.S. 785 (1981), for the proposition that only a "statute of limitations" may be tolled. Pet. Br. at 32, n.34. That reliance is misplaced. First, *Hansen* did not involve a time limitation, but rather a requirement that applicants for social security benefits file a written application. Thus, *Hansen* simply did not speak to whether certain types of "time limits" fall outside of a district court's equitable tolling powers. Second, *Hansen* was an *estoppel* not a tolling case, and estoppel does not apply against the federal government where the public fisc is at issue. *See OPM v. Richmond*, 496 U.S. 414 (1990)(discussing *Hansen* and rejecting estoppel claim against the government). In contrast, one term after *Richmond* was decided, the Court in *Irwin* expressly held that "tolling" presumptively applies in suits against the government.

Thus, estoppel and tolling are fundamentally different. One important reason for this is that estoppel raises unique separation of powers concerns that are not present in equitable tolling. *See Richmond* (estoppel not permitted because, *inter alia*, "[i]f agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the Clause reposes in Congress in effect could be transferred to the Executive"). 496 U.S. at 428.

Finally, given the reasons that prompted the *Irwin* Court to adopt a presumption in favor of tolling, petitioners' attempt to distinguish *Irwin* on the basis of subtle distinctions between various types of "time limits" is particularly inappropriate. As the Court stressed, "a continuing effort on our part to decide each case on an ad hoc basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. We think that this case affords us an opportunity to adopt a more general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 111 S.Ct. at 457.[7]

In any event, even if *Irwin* does not directly dictate the result in this case, tolling was nevertheless proper. *Irwin* did nothing more than create a *presumption* in favor of tolling. That presumption was created (as are all presumptions) because the Court recognized a general congressional intent applicable to a certain type of statutory provision -- "time limits." If the 12-month timeliness requirement is not a "time limit" as that term was used in *Irwin*, that means only that Congress' particular

[7] Petitioners also erroneously rely on IRCA's judicial review provision in support of their contention that the filing period is not subject to tolling. *See* Pet.Br. at 28-29 (*citing* 8 U.S.C. §1255a(f)). First, as Respondents' Brief explains, IRCA's specialized review provisions apply only to actual denials of individual applications and not to the present challenges. Second, Congress' decision to preclude review of untimely individual applications was prompted by its recognition that historically many *ineligible* applicants would purposefully file late in order to prolong deportation. *See* Brief for Gov't at 15-16, *McNary v. Haitian Refugee Center*, 111 S.Ct. 888 (1991)(No. 89-1332)(judicial review limited because Congress "[c]oncerned about the incentives and opportunity of ineligible applicants to delay the disposition of their cases and derail the program"). That concern is plainly not applicable to respondent class members who are not only eligible but who tried to file in timely fashion only to be prevented from doing so by INS.

intent in enacting IRCA must be surveyed (without the benefit of the *Irwin* presumption) in order to determine whether tolling is consistent with the Act. This is no less than the district courts did here. Indeed, *Irwin* had yet to be decided at the time the district courts issued their remedial orders. Thus, even without the benefit of the *Irwin* presumption, the district courts found that tolling was consistent with congressional intent.[8]

Finally, petitioners rely generally on *INS v. Pangilinan* and in particular on the Court's statement that courts of equity may not "disregard statutory and constitutional requirements" or "create a remedy in violation of the law." Pet.Br. at 29-31, *quoting Pangilinan*, 486 U.S. at 883. Petitioners' reliance is misplaced. Neither *amici*, nor respondents, suggest that a federal court may create a remedy "in violation of the law." Rather, the purpose of an equitable remedy is to *further* the legislative purpose. The question, therefore, is whether tolling would be inconsistent with congressional intent and thus a "violation of the law." *Pangilinan* is nothing more than a straightforward application of the principle that equitable modification must be "consonant with the legislative scheme." *American Pipe and Construction*, 414 U.S. at 557-58. The Court there examined the intent underlying the statute and concluded that Congress would not have wanted the filing period of a 1940 Act to have remained open for applicants "who filed more than 30 years after

[8] If *Irwin*'s very specific presumption in favor of *tolling* does not apply here, the general presumption that the district courts enjoy the full panoply of their equitable powers until Congress indicates otherwise continues to control. *See, e.g. Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), *citing Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) ("Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles"); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)("the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command").

the deadline." 486 U.S. at 884. Specifically, the Court noted both that Congress had passed later statutes evincing its intent to close the filing window for Filipino veterans, *id.*, and that despite the government's actions, thousands of Filipinos had nevertheless been naturalized. *Id.* at 885.[9]

Moreover, the Court stressed that the *Pangilinan* applicants were seeking naturalization status and that "the power to make someone a citizen . . . has not been conferred upon the federal courts as one of their generally applicable equitable powers." *Id.* at 883-84. Thus, to the extent that the federal courts have the power to confer citizenship, it must be "performed in strict compliance with the terms of an authorizing statute . . . ." *Id.* at 884. Indeed, in conferring citizenship, the *Pangilinan* district court was not sitting as a district court but as a "naturalization court" pursuant to 8 U.S.C. §1101(a)(24).

In sum, the district courts' narrowly tailored remedial orders are consistent with the decisions of this Court, which have established a strong presumption in favor of equitable tolling, and are not in conflict with *INS v. Pangilinan*.

[9] The objectives underlying IRCA and those underlying the statute at issue in *Pangilinan* are markedly different. In *Pangilinan*, Congress had one objective, to bestow a benefit on Filipino veterans who served our Nation during World War II. In contrast, IRCA was concerned with more than bestowing a benefit on deserving individuals. Congress was concerned as well that the social ills resulting from a large undocumented population be addressed and that INS not be compelled to pursue the largely futile attempt at deporting longtime undocumented residents. Thus, INS' improper implementation of the amnesty program not only harmed deserving aliens, but also undermined Congress' larger public policy of concentrating resources on more effective enforcement methods and alleviating the deleterious effects of a large "shadow population."

II. THE COURTS' POWER TO GRANT EQUITABLE RELIEF TO EFFECTUATE THE INTENT OF THE LEGISLATURE IS REFLECTED IN THE HISTORY OF THE ANGLO-AMERICAN JUDICIAL PROCESS

A. Courts Possess Authority To Employ Equitable Remedies To Implement Legislative Intent

The federal courts' traditional authority to fashion equitable remedies is reflected in the history of Anglo-American jurisprudence. The doctrine of equity recognizes that the legislature, in enacting laws, cannot anticipate all the ways in which rights may be infringed nor specify all the remedies courts should invoke to cure such unauthorized violations. As Blackstone expressed:

> [S]ince in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied in particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed.

1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 61 (10th ed. 1787). Determining when such an unforeseen circumstance has occurred requires examination of legislative intent in light of the specific circumstances before the judge.[10]

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[10] As Blackstone further stated:

> Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law.

2 W. Blackstone COMMENTARIES 62.

If the circumstances of the case appear to be subject to the statute, but are not expressly included, the court is acting within its equitable authority in interpreting the law flexibly and pragmatically.

The doctrines governing the equitable powers of American courts are directly descended from these English judicial principles. As developed under the English system, the essence of equity is the Chancellor's maxim, "equity regards not the form or circumstance, but the substance of the act."[11] Yet the power to grant equitable relief is also circumscribed, and effectuating the purpose of the legislature by enforcing an equitable remedy does not suggest conferring unbridled authority on the judiciary to deviate from legislative intent.

> [E]quity [is] . . . a system of positive jurisprudence . . . . [A]n essential part of its nature [is] a capacity of orderly and regular growth, a growth not arbitrary, according to the will of individual judges, but in the direction of its already settled principles.[12]

Thus, as English equity doctrines stress and as this Court has emphasized, equity constitutes the implementation -- not the rejection or disregard -- of congressional intent.

> Both [courts of equity and law] . . . are equally bound and equally profess, to interpret statutes according to *the true intent of the legislature*. In general laws all cases cannot be foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words, of the legislator; and others, which may fall within the

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[11] W. Billson, EQUITY IN ITS RELATION TO COMMON LAW: A STUDY IN LEGAL DEVELOPMENT 97 (1917).

[12] 1 J. Pomeroy, EQUITY JURISPRUDENCE 48 (1986).

> letter, may be contrary to his meaning, though not expressly excepted. These cases, thus out of the letter, are often said to be within equity, of an act of parliament; and so cases within the letter are frequently out of the equity. Here by *equity* we mean nothing but the sound interpretation of the law.

3 W. Blackstone COMMENTARIES 430-31 (emphasis original in part and added in part). *See* N. Singer, SUTHERLAND STATUTORY CONSTRUCTION §54.02 at 243 (1992).

In this case, the intent of Congress was to provide a 12-month period for applicants to seek legalization pursuant to eligibility criteria established by statute. In implementing IRCA, the INS adopted policies and regulations that the courts have found directly contravened the statutory standards. Indeed, the INS has not challenged those determinations. Instead, it contends that the courts should be deprived of all authority to provide a remedy to effectuate the manifest intent of Congress: a 12-month application period that maximizes both the public good and the private benefits of legalizing a large number of undocumented aliens.[13]

[13] The significance of the 12-month period is underscored by Congress' already-noted mandate that the INS undertake affirmative "outreach" to inform aliens of the eligibility requirements. The fact that Congress legislated such an outreach requirement demonstrates its awareness that the process of informing a fearful population of its rights and waiting for individuals to come forward can be lengthy. The benefit of a 12-month period was entirely eviscerated because INS adopted and publicized unlawful regulations that deterred statutorily eligible persons from applying.

B. The History Of Equity Demonstrates That Courts Have Authority To Afford Meaningful Relief That Furthers The Purpose Of Legislation

The principles of equity from which English and American law are derived have existed for centuries as a mechanism to advance legislative intent.[14] Equity developed on a functional level, in ancient Greece, as a corrective mechanism to render justice where strict application of the law rendered an unjust result. As described by Aristotle, equity is a "rectification of law where it fails through generality."[15]

Both the breadth and the limits of equity are evident from its development in England, and from its antecedents in Roman and Greek law to which the English equity system is traced. Early law, both in ancient Rome and Medieval England, was defined by custom that was only cognizant of common occurrences. The exceptional eluded it and early law elevated form over ethical considerations.[16] Equity, in contrast, based on the sovereign's grace, conscience and discretion, furthered justice. The Praetor in Rome or the Chancellor in England exercised this power as keeper of the King's conscience,[17] and from this a hard body of law emerged over three centuries.[18] Thus, transactions that were formalistically correct could be overturned by the Praetor to remedy fraud, du-

[14] W. Billson, *supra* note 11, at 4.

[15] O. Fiss, D. Rendelman, INJUNCTIONS 104 (2d ed. 1984). *See also* Aristotle, NICOMACHEAN ETHICS (Book V, Ch. 10) and RHETORIC (Book I, Ch. 13).

[16] W. Billson, *supra* note 11, at 35.

[17] W. Billson, *supra* note 11, at 16.

[18] *Id.* at 6-7.

ress, and mistake; to enforce contracts; and, most importantly, to effectuate intent and avoid elevating form over substance.[19] Similar actions by the English Chancellor evidence the influence of Roman law on our modern tradition.[20]

The Roman Praetor's equitable rules of intestate succession to vindicate the natural claims of blood relatives are an example of the equitable principle that achieving the law's intent may require employing a remedy not specified by the lawmaker. Roman customary law dictated paternal succession but was silent on intestate succession. The Praeter recognized that blood relationship was at the heart of the agnatic system and that the rules of succession gave effect to those relationships. Thus, if the child of a Roman father and a non-Roman mother had not received the fiat of the Emperor, as was necessary at law to become subject to the Roman father's power, the law did not confer the estate on the child if the father died intestate. The Praetor's rules allowed the child to receive the estate absent such formal imperial recognition[21] and recognized succession rights of the wife's family in the absence of an agnate, a practice that did not exist at law.[22] These provisions did not introduce a new form of succession. Rather, they applied the basic principle of blood relationship embod-

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[19] *Id.* at 22.

[20] *Id.* at 17-18. M. Hamburger, "Equitable Law: New Reflections on Old Conceptions," *reprinted in* 17 Social Research No. 4, at 441-42 (Dec. 1950). While common law countries have not been as heavily influenced by Roman law, Anglo-American law has adopted Roman equitable maxims.

[21] W. Billson, *supra* note 11, at 26. The Praetor would not confer benefits were burdens were not accepted. Thus, if an agnate refused the ancestral estate, the Praetor would deny the agnate rights against ancestral creditors. *Id.* at 27.

[22] *Id.* at 33.

ied in the formal provisions in a manner consistent with the law's underlying purpose.

The English tradition reveals a more fully developed set of equitable powers.[23] By the 14th and 15th centuries it became clear that the extraordinary jurisdiction of equity was needed to temper the rigidity of the common law, and the Chancellor was the natural official to reform the law.[24] By the end of the 16th century the Chancery was a separate court with common law and equity jurisdiction, the latter being the more important of the two.[25]

The Chancery created many enforcement remedies, most notably those in contract law. The common law enforced only certain types of executed contracts.[26] The Chancery, however, began operating under the principle that contracts were based on consent and that such consent should create an actionable obligation.[27] These insights affected both the common law and equity courts. The common law courts were roused to enforce simple contracts so that the Chancery did not usurp all of its jurisdiction. However, the remedy afforded by the common law courts remained restricted to damages for breach. Thus, the Chancery jurisdiction remained vital not because the concept of contract rights remained stagnant in the common law courts, but because only equity could afford a meaningful remedy, such as restitution and specific performance.[28]

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[23] *Id.* at 53.

[24] 1 W. Holdsworth, History of English Law 399 (1903).

[25] *Id.* at 409.

[26] *Id.* at 455.

[27] *Id.* at 455-56.

[28] *Id.* at 456.

While there was at times tension between the courts of law and the courts of equity, the two strands of our jurisprudence have now long been reconciled. By the latter part of the 17th century principles of equitable jurisdiction were adopted generally and were firmly in place by the beginning of the 19th century.[20] Equitable remedies to implement the intent of Congress are firmly embedded in our jurisprudence and manifest an historical, and critical, function of the courts.

In sum, the limited extensions of the application period ordered by the district courts are consistent with the history and purpose of equitable remedies. They plainly further the intent of Congress to afford aliens a full application period, they do not trench upon any public policy of Congress to the contrary, and they are tailored to provide a meaningful remedy for a legal wrong.

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[20] *Id.* at 465.

CONCLUSION

For the reasons and upon the authorities cited above, *amici* urge that the decision of the court of appeals be affirmed.

Respectfully submitted,

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